

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0377, Physicians Dialysis, Inc. v. David R. Haight, the court on May 31, 2006, issued the following order:

The plaintiff, Physicians Dialysis, Inc., appeals the trial court's order upholding the decision by the New Hampshire Department of Labor (DOL) on a wage claim filed by the defendant, David R. Haight. We affirm in part, reverse in part, and remand.

"We will affirm the superior court's factual findings unless they are unsupported by the evidence and we will affirm the superior court's legal rulings unless they are erroneous as a matter of law." New England Homes v. R.J. Guernaccia Irrevocable Trust, 150 N.H. 732, 734 (2004) (quotation omitted).

We first address the plaintiff's assertion that the superior court erred by upholding the DOL's award of liquidated damages. The defendant argues that the award was proper because the plaintiff withheld the severance pay "willfully and without good cause." RSA 275:44, IV (1999). For the purposes of addressing this argument, we assume, without deciding, that the severance pay constituted wages. We conclude that the liquidated damages award was improper.

Under RSA 275:44, IV: "If an employer willfully and without good cause fails to pay an employee wages as required under . . . this section, such employer shall be additionally liable to the employee for liquidated damages." We have construed "willfully and without good cause" to mean "voluntarily, with knowledge that the wages are owed and despite the financial ability to pay them." New England Homes, 150 N.H. at 739-40 (quotations omitted). A willful act, however, does not include an accident or an act committed on the basis of a mistake of fact. *Id.* at 740. "Thus, no liquidated damages are available when an employer's refusal to pay wages is based upon bona fide belief that he is not obligated to pay them." *Id.* (quotation omitted).

Here, the DOL ruled that the plaintiff had no obligation to pay the severance pay until the defendant executed a mutual release. The defendant has not signed the release. Under these circumstances, we conclude that it was error for the superior court to uphold the DOL's finding that the plaintiff's failure to pay the severance was willful and without good cause.

We next address the plaintiff's contention that the superior court erred when it upheld the DOL's finding that the defendant was entitled to the severance pay upon signing the mutual release. The plaintiff asserts that this was error, in part, because the severance pay did not constitute wages until it became "due." We assume, for the purposes of addressing this argument, that this assertion is correct. Under the parties' agreement, the severance pay became "due" once the defendant signed a mutual release. Thus, once the defendant signs the mutual release, the severance pay becomes "due" and therefore becomes wages.

In effect, this is precisely what the DOL ruled. The DOL determined that the plaintiff was not obligated to pay severance pay to the defendant until he signed a mutual release. Accordingly, we do not disturb the superior court's order relative to this portion of the DOL's decision.

We do not address the defendant's contention that the contractual provision requiring him to sign the mutual release was unlawful. The defendant has not preserved this argument for our review. *See SNCR Corp. v. Greene*, 152 N.H. 223, 224 (2005). Although the DOL ruled that the defendant was not entitled to receive any of the severance pay until he signed a mutual release, the defendant did not appeal this ruling. Thus, the issue was not properly before the superior court and is not properly before us. *See id.*

Affirmed in part; reversed in part; remanded.

DUGGAN, GALWAY and HICKS, JJ., concurred.